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NO HABEAS CORPUS FOR THE GUILTY?: *Barksdale v. Blackburn*—A
TIME FOR REAPPRAISAL

In October, 1963, Bruce Barksdale, with hammer in hand, robbed and raped a young woman in her apartment. He was indicted by a twelve member grand jury, two of whom were black, on the charge of aggravated rape. The trial produced overwhelming evidence against him, including three positive identifications and a signed confession. Although Barksdale pleaded not guilty,¹ he offered no defense, questioned no evidence, and ultimately was convicted by an all white jury. For eighteen years, Barksdale, a black man, turned to every available channel of review, alleging discrimination in the selection of both the grand jury and the petit jury venire.² The Louisiana Supreme Court, on appeal, unanimously found no discrimination.³ The United States Supreme Court denied certiorari.⁴ Both the state supreme court⁵ and the federal district court⁶ denied his petitions for habeas corpus. Then, in 1980, a panel of the Fifth Circuit Court of Appeals, with one judge dissenting,⁷ agreed with Barksdale's contentions and reversed the district court.⁸ The Court of Appeals, however, sitting en banc, reversed the panel and held⁹

1. "Barksdale pleaded not guilty and not guilty by reason of insanity. The insanity defense was never pursued at trial, however, and was withdrawn after closing arguments." 639 F.2d 1115, 1118 n.6 (5th Cir. 1981).

2. Barksdale alleged that all but a token number of Negroes were systematically excluded from the grand jury which indicted him and from the petit jury venire from which the jurors who tried him were selected. 639 F.2d at 1117 n.1.

3. *State v. Barksdale*, 247 La. 198, 170 So. 2d 374 (1964).

4. *State v. Barksdale*, 382 U.S. 921 (1965).

5. *State ex rel. Barksdale v. Dees*, 252 La. 434, 211 So. 2d 318 (1968). Barksdale later applied for habeas corpus relief on other grounds. This petition also was denied. *State ex rel. Barksdale v. Henderson*, 257 La. 551, 242 So. 2d 886 (1971).

6. Barksdale's petition originally was heard by a magistrate. Upon his recommendation, the district court set aside the conviction. The state's appeal was dismissed. *Barksdale v. Henderson*, cert. denied, 419 U.S. 880 (1974). The state then moved to vacate the judgment based on an improper holding of a hearing by a magistrate under *Wingo v. Wedding*, 418 U.S. 461 (1974). The motion was granted and affirmed on appeal. *Barksdale v. Henderson*, 510 F.2d 382 (5th Cir. 1974), cert. denied, 422 U.S. 1045 (1975). The case was remanded for an evidentiary hearing and after three such hearings, the district court finally denied the petition. See 639 F.2d at 1119.

7. Judge Ainsworth dissented, 610 F.2d at 272, and subsequently wrote the en banc opinion, 639 F.2d at 1116.

8. *United States ex rel. Barksdale v. Blackburn*, 610 F.2d 253 (5th Cir. 1980).

9. The precise basis for the court's holding is not clear: "Since we find that Barksdale has not proven a prima facie case of jury discrimination, the state's rebuttal evidence may seem to be superfluous. But we hold, as an alternative grounds for our decision, that even assuming, *arguendo*, that Barksdale did meet his initial burden, the state adequately rebutted his case." 639 F.2d at 1128.

that Barksdale had failed to prove a prima facie case of discrimination with respect to both the grand jury and the petit jury venire. *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115 (5th Cir. 1981).

One of the issues which apparently merited en banc consideration¹⁰ was whether the defendant's guilt or innocence should be a preliminary consideration within habeas corpus review. Although ultimately dicta,¹¹ the court questioned whether the recent Supreme Court decision in *Rose v. Mitchell*¹² made all claims of state grand jury discrimination cognizable on federal habeas corpus and whether, in light of the facts and circumstances of a particular case, such grand jury discrimination might be harmless error.¹³

The term "habeas corpus," which literally means "have the body,"¹⁴ refers to a variety of writs whose purpose is to bring a party before a court or judge.¹⁵ When used alone, the two words commonly refer to the writ of *habeas corpus ad subjiciendum*, whose primary function is to release a person from unlawful imprisonment.¹⁶ Article I, section 9 of the United States Constitution explicitly recognizes the writ,¹⁷ and the Judiciary Act of 1789 included it in the first grant of federal court jurisdiction.¹⁸ But, because neither the Constitution

10. For a case to receive en banc consideration, the court must find a suggestion of "a precedent setting error of exceptional public importance." 5th Cir. R. 16.1.

11. "[W]e need not rest on the inappropriateness of habeas corpus since we find that Barksdale's claims do not prevail on the merits." 639 F.2d at 1121.

12. 443 U.S. 545 (1979).

13. 639 F.2d at 1120.

14. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 634 (unabridged ed. 1966).

15. Among these writs are the writs of *habeas corpus ad prosequendum* (used to remove a prisoner in order to prosecute in the proper jurisdiction wherein the fact was committed), and the writ of *habeas corpus ad testificandum* (used to bring up a prisoner detained in a jail or prison to give evidence before the court). See BLACK'S LAW DICTIONARY 638-39 (5th ed. 1979).

16. See *Stone v. Powell*, 428 U.S. 465, 474 n.6 (1975) (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.)).

17. "The privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. I, § 9.

18. That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of committment.—*Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of

nor the Judiciary Act defines the term "habeas corpus," great disagreement has developed over the exact scope of the writ.¹⁹ The first guidance as to the appropriate function of the writ was given by the Supreme Court in *Ex parte Bollman*.²⁰ In that opinion, Chief Justice Marshall maintained that to understand "the meaning of the term habeas corpus, resort [should] unquestionably be had to the common law."²¹ The common law referred to by Justice Marshall was the heritage of English law brought to the continent by the colonists and often expressed in the colonial charters and statutes and later, in the state constitutions. Since all but one of the colonies modeled their habeas corpus statutes after the English Habeas Corpus Act of 1679,²² the accepted function of the writ of habeas corpus at the time of the framing of the Constitution probably was the same function the writ served in England at that time.

By the latter part of the eighteenth century, England's writ of habeas corpus had been molded by a long history of religious conflicts, jurisdictional disputes, and political battles between Parliament and the Crown.²³ In its earliest form,²⁴ the writ constituted a step in the mesne process²⁵ whereby the sheriff was ordered to "produce the body" of an unwilling party before the court to answer a complaint against that party.²⁶ In the fourteenth century the writ of

the authority of the United States, or are committed for trial before some court of the same, or as necessary to be brought into court to testify.

Act of Sept. 24, 1789, c. 20, § 14, 1 Stat. 81-82.

19. See generally the authorities cited in notes 20, 22 & 23, *infra*.

20. 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.). See also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830) (Marshall, C.J.); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157 (1883); McFeeley, *The Historical Development of Habeas Corpus*, 30 S.W. L.J. 585 (1976).

21. 8 U.S. (4 Cranch) at 95.

22. See Oaks, *Habeas Corpus in the United States, 1776-1865*, 32 U. CHI. L. REV. 243, 253 (1965).

23. For an excellent review of the English legal history concerning the writ of habeas corpus, see Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978). See also 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 108 (rev. 7th ed. 1956); 1 J. REEVES, THE HISTORY OF ENGLISH LAW 147 (5th ed. W. Finlanson ed. London 1869); McFeeley, *supra* note 20.

24. The writ was established in about the thirteenth century. See Duker, *supra* note 23, at 993.

25. "As distinguished from *final* process, this signifies any writ of process issued between the commencement of the action and the suing out of execution." BLACK'S LAW DICTIONARY, *supra* note 15, at 1085.

26. See generally Duker, *supra* note 23, at 995.

habeas corpus and the writ of certiorari were combined in use: A prisoner would petition for a writ of certiorari to examine the cause of his imprisonment, and the court would issue a writ of habeas to bring the petitioner before it. This combined use of the two writs became so common that a separate and distinct form of writ evolved, one which a prisoner petitioned for directly: *habeas corpus cum causa*.²⁷

During the fifteenth and sixteenth centuries, the writ of habeas corpus, which could be issued by all organs of government, became a useful tool in a great struggle for power among the various institutions of England's government.²⁸ Since the English governmental system was not based upon the separation of powers doctrine, the jurisdiction and power of what Americans would consider various

27. *Id.*

28. The biggest struggle during this period was between the various central courts, especially the Chancery (equity) Courts and the courts of common law. The judges of the Chancery Courts were governed only by the dictates of their conscience in administering justice. 1 J. REEVES, *supra* note 8. They were, therefore, very open to influence by the King who held their appointments in his hand. The notorious Star Chamber, one of the Courts of Chancery, was especially abusive in the eyes of the English people. The King, through this Court, often imprisoned persons who began to rival him in importance. The abuses by the Star Chamber led to its legislative abolishment in the original Habeas Corpus Act of 1641. 1640, 16 Car. 1, c. 10, § 3 cited in Duker, *supra* note 23, at 1036.

In 1605, the King's Bench was held to be the superior court, and therefore no writ of habeas corpus could remove a person committed by it. *Anon.*, 72 Eng. Rep. 883 (K.B. 1605). However, this holding did not give the King's Bench the power to remove someone committed by another court with jurisdiction. Duker, *supra* note 23, at 1017-18.

The courts of common law also felt that the High Commission or ecclesiastical courts had no authority to fine or imprison and so held in *Sir Anthony Roper's Case*, 77 Eng. Rep. 1326 (K.B. 1608). The writ often was used to free persons imprisoned by this court for purely "spiritual" matters. See *Lady Throgmorton's Case*, 77 Eng. Rep. 1347 (K.B. 1611) (broke up daughter's marriage); *Sir William Chancey's Case*, 77 Eng. Rep. 1360 (K.B. 1612) (adultery).

29. There were basically four organs of law: the central courts, the local courts, the House of Lords, and the Privy Council. The central court system was made up of the Court of Chancery, which handled matters in Equity; the King's Bench, which handled criminal cases; the Court of Exchequer, which handled cases involving royal revenues; the Court of Common Pleas, which handled civil matters; the High Commission, which handled ecclesiastical matters; the Court of Requests, which handled claims for small debts. All judges were appointed by the King and could be removed at his will. They sat in the Great Hall of Westminster in London. See BLACK'S LAW DIC-

"branches" of government²⁹ often overlapped.³⁰ By issuing a writ, one "branch" or institution would bring a prisoner before it to determine if the court, council, or lord who had imprisoned the person had the jurisdiction and therefore the power to hear such a case. The institution issuing the writ would only question the cause of commitment, however, and if the cause as given in the return was a proper cause to be handled by the imprisoning agent, no relief would be granted.³²

During the seventeenth century, the writ came to be seen as a "protector of liberty."³³ Before the transition at the end of the seventeenth century from the monarchical system of government to the parliamentary system,³⁴ the King often exercised arbitrary powers³⁵ and the writ was used to gain release for persons imprison-

TIONARY, *supra* note 15, at 321-26. The local court system met at the county level and was composed of justices of the peace, appointed by the King, who met four times a year at the largest city in the county to hear cases of people who could not go to Westminster. The House of Lords, comprised of clergymen and abbots, was the ultimate word in the legal system. A number of lords were appointed royal officials by the King. The highest royal official was the Lord Chancellor and was usually a peer of the realm. He also served as the Chief Justice of the Court of Chancery. The Privy Council, a predecessor of the modern day administrative agency, was the organ through which the King carried on the work of the government. 1 W. HOLDSWORTH, *supra* note 23, at 477-78.

30. See Duker, *supra* note 23, at 1025.

31. *Id.* at 1018.

32. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-43 (1970). As late as 1758, the judges of the various central courts agreed that the truth of the return was not examinable because it was a question of fact for a jury to be ascertained in other proceedings. The court said it was not concerned with the truth of the return but with the sufficiency in point of law to justify detention. 9 W. HOLDSWORTH, *supra* note 23, at 119-20.

33. Duker, *supra* note 23, at 1030. See also *Darnell's Case*, 3 Cobbett's St., Tr. 1 (1627).

34. Duker, *supra* note 23, at 1031.

35. See note 28, *supra*; the Grand Remonstrance, which was a stinging indictment of the King for past malfeasance, C. FIRTH, *THE HOUSE OF THE LORDS DURING THE CIVIL WAR* 98-99 (1910); the Habeas Corpus Act of 1641, *supra* note 28, abolishing the Star Chamber while providing the writ to examine the cause of imprisonment by any court claiming the same jurisdiction as the Star Chamber, the Privy Council, or the King. The people were especially unhappy with the royal tax system. See, e.g., *Darnell's Case*, 3 Cobbett's St., Tr. 1 (1627) (imprisonment for refusal to pay King Charles forced loan). The aggravated state of finances forced the King one year after *Darnell's Case*

ed as a result of such powers. Because the imprisonment was often without a hearing, on the basis of invalid laws or royal orders, the writ of habeas corpus earned the title "protector of liberty."

Protection of liberty, or protection from illegal detention as it is sometimes called, meant something quite different in the sixteenth and seventeenth centuries from what it means today. Detention was illegal only if it was without recourse within the judicial process³⁶—not because a particular constitutional right of the person had been infringed,³⁷ or because of an impropriety or error in the proceedings.³⁸ Although habeas corpus was the only means a prisoner had to seek review of his imprisonment, the writ was not available to everyone. In fact, the Habeas Corpus Act of 1679³⁹ specifically exempted from the use of the writ persons committed for "felony or treason" and persons "convict[ed] or in execution by legal process."⁴⁰

to assemble a Parliament. Many of those elected to this Parliament had suffered imprisonment for failure to pay the unconstitutional appropriation. J. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE 17th CENTURY* 61 (1928).

36. See McFeeley, *supra* note 20, at 590. See also *Bushnell's Case*, 124 Eng. Rep. 1006, 1007 (C.P. 1670). Arguably, the writ of habeas corpus was a procedural tool used basically to insure a speedy trial by jury. See 31 Cr. 2, c. 2, § 7, as summarized in 9 W. HOLDSWORTH, *supra* note 23, at 118 ("Prisoners indicted for treason or felony must be tried at the next session or bailed; . . . if not tried they must be discharged."). There is some evidence that this idea was carried over in American. For example, Charles Pinckney, at the convention to ratify the Constitution in South Carolina said, "The next Article provides for the privilege of the Writ of Habeas Corpus—the Trial by Jury in all cases" 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 149 (M. Farrand ed. 1937).

37. See McFeeley, *supra* note 20, at 590.

38. See, e.g., Habeas Corpus Act of 1816, 56 Geo. III, c. 100; *Ex parte Thomas*, 13 J.P. Jo 762 (1849) ("if . . . a party is rightly in custody, we do not interfere."); *In re Andrews*, 4 C.B. 226 (1847) (a court cannot entertain questions as to irregularities of process); *In re Cobbett*, 7 Q.B. 187 (1845) ("where detention is objected to solely on the ground of an alleged impropriety in the details of the suit . . . this court will not interfere"); *In re Baines*, 41 E.R. 401, L.C. (1840) ("The object of our control . . . is . . . not to correct any error . . ."). The above citations appear in 16 THE ENGLISH EMPIRE DIGEST 284, 285, 290 (1981 reissue).

39. 1679 31 Car. 2, c. 2. The Act was passed to rectify a number of problems: prisoners being sent overseas beyond the reach of the writ, see ADMINISTRATION OF JUSTICE DURING THE USURPATION OF THE GOVERNMENT, 5 STATE TRIALS at 941; 9 H.C. JOUR. 142 (1669); what to do when the Court was out of term or in vacation, see, e.g., Proceedings against Francis Jenkes, (1678), 6 STATE TRIALS at 1190; insulation from the writ by the concept of privilege, see, e.g., Proceedings against Anthony Earl of Shaftsbury, (1677), 6 STATE TRIALS at 1269-1306, as cited in Duker, *supra* note 23, at note 440, 492, 505.

40. 31 Car. 2, c. 2, § 2 (1679). See, e.g., *Ex parte Lees*, 120 Eng. Rep. 718, 721 (Q.B.

The law as clarified by the Habeas Corpus Act of 1679 and later, by the Bill of Rights of 1688,⁴¹ was not altered for more than a century.⁴² Thus, when the United States Constitution was framed⁴³ and the Judiciary Act enacted, the common law writ of habeas corpus was an extraordinary remedy available to relieve only very limited types of illegal custody—non-judicial custody, detention under order of a court which was without jurisdiction in the matter (including lack of jurisdiction because the cause set out in the writ was not considered a crime),⁴⁴ or pretrial detention without bail or speedy trial. This function of the writ, as embodied in the Habeas Corpus Act of 1679 and adopted by most of the colonies,⁴⁵ served as the model for Chief Justice Marshall in his interpretation of the Constitution and the Judiciary Act.⁴⁶

In 1789, Congress passed the first Judiciary Act⁴⁷ empowering the federal courts to issue writs of habeas corpus only to federal prisoners; the courts were prohibited from issuing writs to state prisoners.⁴⁸ Two years later, Congress passed the Bill of Rights⁴⁹

1860). See generally McFeeley, *supra* note 20. See also 9 W. HOLDSWORTH, *supra* note 23, at 118; *Developments*, *supra* note 32, at 1044-45; Note, *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L. REV. 392, 394 (1977).

41. The Bill of Rights corrected the abusive bail courts had been applying to evade the Act. 1 William & Mary Sess. 2, c. 2, § 1(10).

42. 9 W. HOLDSWORTH, *supra* note 23, at 119. See also *Ex parte Lees*, *supra* note 40, and other cases at note 38, *supra*.

43. Those delegates who met in Philadelphia were fully aware of the common law and the colonial experience with habeas corpus. Colonial governors and councils had attempted to enforce obedience by detaining persons without judicial proceedings, and numerous instances have been reported where the writ was used against imprisonment by these governors and proprietors. See generally R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 101 (1876); W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 2 (2d ed. 1893); McFeeley, *supra* note 20, at 594.

44. Today an unconstitutional statute would be comparable to insufficient cause.

45. See note 22, *supra*, and accompanying text.

46. See note 20, *supra*, and accompanying text.

47. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73.

48. "Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States" For the full text see the Judiciary Act of 1789, *supra* note 18. Also, one commentator suggests that the clause was placed in the Constitution to prohibit Congress from suspending state habeas relief for federal prisoners. See Duker, *Rose v. Mitchell and Justice Lewis Powell: The Role of Federal Courts and Federal Habeas*, 23 HOW. L.J. 279 (1980).

49. The first ten amendments to the Constitution were submitted together to Congress in 1789; ratification was completed on December 15, 1791. See HART & WECHSLER, *infra* note 133.

which was also applicable only to the federal government.⁵⁰ Not until 1867,⁵¹ following the Civil War and just prior to the passage of the fourteenth amendment, did Congress enact legislation to broaden the scope of the writ to bring state petitions within the jurisdiction of the federal courts.⁵²

Even after the 1867 Act the federal courts continued to follow the traditional jurisdictional test and refused to hear petitions if the state court had had proper jurisdiction to hear the cause.⁵³ During the late nineteenth century and into the early twentieth century, however, the Supreme Court began expanding the concept of "jurisdiction," thereby increasing the availability of the writ.⁵⁴ The Court

50. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

51. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

52. Most legal scholars realize that the 1867 Act was designed to aid the Reconstruction policy. Duker, *supra* note 48, at 289. In fact, the revocation of an 1868 measure removing the Supreme Court's appellate jurisdiction in habeas corpus matters, was seen as a signal that Reconstruction was over and that federal interference with the state criminal processes was again unwelcome. *Id.*

53. See, e.g., *Pettibone v. Nichols*, 203 U.S. 192 (1906); *In re Woods*, 140 U.S. 278 (1890); *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38 (1822).

54. "During the nineteenth century, the expansion was so gradual that the Court may not" have been aware of the far-reaching results of its actions. Comment, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1124 n.12 (1980).

The decline of the jurisdictional requirement accelerated with *Frank v. Mangum*, 237 U.S. 309 (1915), and *Moore v. Dempsey*, 261 U.S. 86 (1923). *Frank* held that a federal court could not grant habeas corpus relief where to do so would disturb an adequate state determination; the state had provided Frank such a determination. However, the justices stated that though a state trial court may have jurisdiction originally, mob domination could cause it to lose that jurisdiction in the course of the proceedings. Habeas corpus could therefore be used to inquire into the whole of the proceedings to see if the treatment afforded the defendant fell below what due process required. Of course, at that time the concept of due process in state criminal justice was construed very narrowly. See Comment, *supra*, at 1124 n.13. In *Moore*, although the Court focused on the adequacy of the process available in the state (as had *Frank*) and found it had not been provided, the Court was also concerned with the substance of the petitioner's claim. In *Moore*, the Court dealt with a situation it could reason satisfied the *Siebold/Frank* jurisdictional test: "When the proceedings, though formally proper, were really so defective that the trial was a sham, the trial becomes absolutely void," and habeas corpus is a suitable remedial measure. 261 U.S. at 92. Commentators dispute the consistency of *Moore* and *Frank*. Compare Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 488-89 (1963), with Rietz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1962). After *Moore*, the Court loosened the jurisdictional requirement even further. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938) (the trial court lacked jurisdiction when the defendant was unconstitutionally deprived of the assistance of counsel).

reasoned that "compliance with . . . [a] constitutional mandate . . . [was] an essential jurisdictional prerequisite" and that a "court's jurisdiction at the beginning of [a] trial [could] be lost 'in the course of the proceedings'" if the court committed a constitutional error.⁵⁵ Of course, during this same period there was a two-tiered level of analysis used in determining whether a court had committed constitutional error: The full Bill of Rights applied in federal proceedings, while only a restricted interpretation of due process within the meaning of the fourteenth amendment applied in state proceedings. This bifurcated approach often led to cases where grave constitutional errors by today's standards, if committed by a state court, would not be cognizable on federal habeas corpus review.⁵⁶ As the Court began to expand the concept of due process to include guarantees enumerated in the Bill of Rights, however, more and more state courts were deemed to have lost jurisdiction based on constitutional error. The inevitable expansion of the scope of the writ forced the Court to reconsider its jurisdictional requirement and, in *Waley v. Johnston*,⁵⁷ the Court abandoned the requirement and simultaneously extended habeas corpus to cases where the jurisdiction was valid but where "the conviction . . . [had] been in disregard of the constitutional rights of the accused, and where the writ . . . [was] the only effective means of preserving his rights."⁵⁸

After *Waley*, a petitioner seeking federal habeas relief had only to meet two procedural requirements: He had to prove that he had not been afforded an adequate state corrective process, and he must have exhausted all state remedies. In 1953, the Court in the companion cases of *Brown v. Allen*⁵⁹ and *Daniels v. Allen*⁶⁰ rejected the adequate state corrective process requirement⁶¹ while retaining the ex-

55. *Johnson v. Zerbst*, 304 U.S. at 467, 468.

56. *In re Moran*, 203 U.S. 96 (1906) (denying federal prisoners relief although their convictions allegedly violated the fifth amendment). See also *In re Wood*, 140 U.S. 270 (1891) (denying a state prisoner relief based on a claim of discriminatory selection of grand and petit jurors); *Ex parte Bigelow*, 113 U.S. 328 (1885) (denying a double jeopardy claim).

Another development which could have been relevant to the Court's broadening interpretation of cognizable claims took place in 1916. In that year, Congress passed a jurisdictional statute which for the first time gave the Supreme Court discretion (on certiorari) to refuse to review on the merits many cases where a state criminal defendant's federal contentions had been rejected by the state courts. Act of Sept. 6, 1916, ch. 448, § 237, 39 Stat. 726.

57. 316 U.S. 101 (1942) (coerced guilty plea, facts dehors the record).

58. *Id.* at 105.

59. 344 U.S. 443 (1953).

60. *Id.* These cases were reported together.

61. See text at notes 63-65, *infra*.

haustion requirement.⁶² In *Brown*, although concluding that a federal district court could decline to award a writ of habeas corpus without a rehearing of the facts,⁶³ the Court stated that "a trial . . . [could] be had in the discretion of the federal court or judge,"⁶⁴ even when the issue had been fully and fairly litigated at the state level.⁶⁵ In a later opinion⁶⁶ the Court said that *Brown* symbolized a "manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."⁶⁷

The continued expansion in the scope of the writ paralleled the Warren Court's expansion of the concept of due process. Habeas corpus seemingly was becoming the procedural tool used by the Court to enforce its constitutionalization of criminal procedure.⁶⁸ *Fay v. Noia*,⁶⁹ in 1963, marked the high point in the expansion of the writ. In that opinion, the Court concluded that a failure to make a timely appeal within the state corrective process should not bar federal habeas review.⁷⁰ The effect of this decision was to remove the last

62. "A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus." 344 U.S. at 487. "Failure [to appeal] . . . bars subsequent objection to conviction . . ." *Id.* at 486.

63. *Id.* at 465.

64. *Id.* at 463-64.

65. See Bator, *supra* note 54, at 493-99; Note, *supra* note 40, at 400.

66. *Faye v. Noia*, 372 U.S. 391 (1963). Friendly interpreted the *Brown* reasoning as follows: The Court felt that with the growth of the country and increased court business, "it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155 (1970).

67. 372 U.S. at 424. The year before *Brown*, the Conference of Chief Justices had adopted a resolution expressing a consensus that "a final judgment of a State's highest court [should] be subject to review or reversal only by the Supreme Court of the United States." CONFERENCE OF CHIEF JUSTICES—1952, 25 STATE GOVERNMENT 249-50, as cited in *Brown v. Allen*, 344 U.S. at 451 n.5. Although citing this resolution as evidence of the sensitivity in the area, the majority in *Brown* gave the Chief Justices a negative response. Two years after the decision, the Chief Justices, in a joint effort with a committee of the Judicial Conference of the United States, tried again. *Habeas Corpus: Hearing on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 34, 89-95 (1955). The more detailed bill passed the House but died in the Senate. See Note, *supra* note 40, at 403.

68. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041-42 (1977). See also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS 235 (1967). A broadened concept of standing also helped the Court to enforce the rules set out in its opinions. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978).

69. 372 U.S. 391 (1963).

70. See Note, *supra* note 40, at 399. *Fay* also announced a "deliberate by-pass

time limitation in petitioning for federal review, thereby greatly increasing the number of petitions the federal courts would receive. This dramatically increased caseload left what Justice Frankfurter called an "untidy area"⁷¹ in its wake.⁷²

During the last ten years, the Burger Court has not made any major expansions in the federal court's habeas corpus jurisdiction.⁷³ In fact, the decision in *Stone v. Powell*⁷⁴ in 1976 actually withdrew federal habeas corpus jurisdiction from those cases in which evidence obtained in unconstitutional searches and seizures was introduced at trial.⁷⁵ Possibly more significant, though, was the indication in *Stone* that for the first time a majority⁷⁶ of the Court may

test," 372 U.S. at 438, under which an "intentional relinquishment or abandonment of a known right or privilege" by a petitioner who directly participated in the decision must be made. *Id.* at 439 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The *Fay* Court also asserted that at the time of the Suspension Clause and the first Judiciary Act "there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law." 372 U.S. at 405. It has now been shown that this assertion is simply wrong. The historians cited in the opinion disagree with such a conclusion. See Bator, *supra* note 54, at 465-83; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 466 (1966).

71. *Sunal v. Large*, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting).

72. In 1952, there were 541 state habeas corpus petitions to federal district courts. *Brown v. Allen*, 344 U.S. at 536 n.8 (Jackson, J., concurring). By 1970, the second year of the Burger court, there were 9,063. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR (Washington, D.C. Administrative Office of the United States Court, 1979) at 61.

73. Also, in Congress, in the last fifteen years, a number of attempts to change the habeas corpus statute have been made. Some commentators say these attempts failed, largely due to a feeling that any withdrawal of jurisdiction would be held unconstitutional. See, e.g., Note, *supra* note 40, at 405. For example, S. 917, 90th Cong., 2d Sess., 114 CONG. REC. 11186, 11189 (1968) contained a provision that would have in effect barred any Article III court from having jurisdiction to reverse or modify a state criminal conviction except on writ of certiorari to the Supreme Court. The provision encountered overwhelming opposition from both legal and legislative communities, opposition which largely centered on the constitutionality of the section under the suspension clause; it was stricken from the bill before it became law. 114 CONG. REC. at 13850-67. Senator Scott, during the debates, said, "it had about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell." *Id.* at 14183.

74. 428 U.S. 465 (1976).

75. *Id.* at 495.

76. Other justices in the past have advocated such a view. See, e.g., Justice Powell in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (concurring opinion); Justice Black in *Kaufman v. United States*, 394 U.S. 217, 233 (1968) (dissenting opinion); Justice Jackson in *Cassell v. Texas*, 339 U.S. 282, 298-99, 302 (1949) (dissenting opinion); and Justice Clark in *Cassell v. Texas*, 339 U.S. at 296 (concurring opinion).

have accepted the view that federal habeas relief should not be available to prisoners who allege only errors that do not cast doubt on their guilt.⁷⁷ However, the holding was more narrow,⁷⁸ and in answer to Justice Brennan's concern that *Stone* would lay the groundwork for a "drastic withdrawal of federal habeas jurisdiction,"⁷⁹ the majority inserted a footnote emphasizing that the decision did not concern the scope of the habeas corpus statute.⁸⁰ Justice Brennan's concern may have been well-grounded, though, for by removing from the jurisdiction of the federal courts a claim which had been reviewed for the past twenty years,⁸¹ the majority expressed a willingness to reconsider the scope of habeas review.⁸² And, although indicating a belief that the authority of the federal courts to issue the writ came from a statutory, not constitutional, basis,⁸³ the Court never addressed the statute upon which its jurisdiction is based.⁸⁴ The *Stone* Court also expressed a confidence in the state judicial system which seemingly was lacking in the past,⁸⁵ *Stone*, coupled with the recent decision in *Sumner v. Mata*,⁸⁶ perhaps indicates a trend in the Court to give more weight to state court determinations.

Three years later, the Supreme Court reviewed a grand jury discrimination claim in *Rose v. Mitchell*.⁸⁷ Although holding that

77. 428 U.S. at 490. "Resort to habeas corpus . . . for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government." *Id.* at 491 n.31. See also Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?* 11 U. RICH. L. REV. 291, 293 (1977).

78. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 482.

79. *Id.* at 517 (Brennan, J., dissenting).

80. "Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. . . ." *Id.* at 495 n.37 (emphasis in original).

81. See *Mapp v. Ohio*, 367 U.S. 643 (1961). But see *Rose v. Mitchell*, 443 U.S. 545, 564 (1980).

82. See *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 202 (1979).

83. 428 U.S. at 474-75. See also Boyte, *supra* note 77, at 307.

84. 1978 Term, *supra* note 82, at 202.

85. "[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. . . . [T]here is no intrinsic reason why . . . a federal judge [is] more competent . . . than his neighbor in the state courthouse." 428 U.S. at 494 n.35.

86. 101 S.Ct. 764 (1981). See text at notes 153-160, *infra*.

87. 443 U.S. 545 (1979).

"federal habeas corpus relief remains available to provide a federal forum for . . . [grand jury discrimination] claims,"⁸⁸ the Court, by the very fact that it considered whether such a claim should be cognizable, implicitly accepted *Stone's* premise that "exceptions to full review might exist with respect to particular categories of constitutional claims."⁸⁹ In Part II of the *Rose* opinion, the Court addressed two initial arguments: (1) whether claims of grand jury discrimination should be considered harmless error, on direct review or in a habeas corpus proceeding, when a defendant has been found guilty beyond a reasonable doubt, and (2) whether such claims should be cognizable at all on federal habeas corpus in light of *Stone v. Powell*.⁹⁰

In Section A of Part II, the Court addressed the issue of harmless error. It determined that a defendant's right to a reversal of his conviction—a right recognized consistently since the adoption of the fourteenth amendment⁹¹—springs from the rights of society as a whole to receive equal protection under the law.⁹² The Court considered this right to be of fundamental importance;⁹³ to violate it would be to cast doubt on judicial integrity and to impair the confidence of the public in the administration of justice.⁹⁴ Admitting that costs accompany any reversal of a conviction⁹⁵—although not recognizing what these costs are nor the weight to be afforded them—the Court reasoned that reversal was less drastic in grand jury discrimination cases than in other cases where a constitutional

88. *Id.* at 564. There was no clear majority on any one part of the opinion. Justice Blackmun delivered the opinion of the Court in which Justice Brennan and Justice Marshall joined; Chief Justice Burger and Justice Rehnquist joined in Parts I, II and IV. Justice White and Justice Stevens joined in Parts I and II. Justice Rehnquist filed a statement concurring in part. Justice Stewart and Justice Powell filed opinions concurring in the judgment in which Justice Rehnquist joined. Justice White filed an opinion dissenting to Parts III and IV, in which Justice Stevens joined. Justice Stevens filed an opinion dissenting in part.

89. 428 U.S. at 478-79. See 1978 Term, *supra* note 82, at 202.

90. However, the Court's analysis of the availability of habeas was unnecessary to its decision, since the respondents failed to make out a prima facie case of discrimination. 443 U.S. at 547. "The opinion, therefore, was merely a signal from the Court that habeas corpus would continue to be used to articulate constitutional values." Duker, *supra* note 48, at 285.

91. 443 U.S. at 551.

92. *Id.* at 556.

93. *Id.*

94. *Id.*

95. *Id.* at 557.

violation occurs, because when a jury discrimination case is retried, no evidence is suppressed.⁹⁶ It also concluded that other available remedies were ineffectual.⁹⁷ Justice Blackmun therefore left open reversal of a conviction as the main route to vindicate the right to equal protection in the selection of a grand jury.⁹⁸

In Section B of Part II, the Court addressed the second issue—whether *Stone v. Powell* barred review of grand jury discrimination claims—and distinguished *Rose* from *Stone* by noting six ways such claims differed from exclusionary rule claims.⁹⁹ However, because the chief concern in Section B was a state court's incapacity to judge itself,¹⁰⁰ this discussion does not diminish the implication in *Stone* that federal habeas relief would be provided only for the arguably innocent,¹⁰¹ unless the State has failed to provide "an opportunity for full and fair litigation"¹⁰² of a claim. *Rose* basically held that a state court was incapable of providing a fair forum for the litigation of a grand jury discrimination claim. Because the Court discussed so many issues related to grand jury discrimination,¹⁰³ the reasoning behind the Court's holding is unclear. *Rose* could be read to suggest any of four different forms of analysis: (1) full review for claims based on "personal constitutional rights" rather than on "judicially created remedies;"¹⁰⁴ (2) full review for claims the Court deems particularly compelling;¹⁰⁵ (3) full review only after having balanced the costs and benefits of each claim;¹⁰⁶ or (4) full review only for those claims questioning the fairness of the state's own corrective procedures when

96. *Id.* at 577-58.

97. *Id.* at 558.

98. *Id.* at 559.

99. (1) Grand jury claims are based on a constitutional violation by the judiciary, whereas exclusionary rule claims are based on violations by the police; (2) the fourteenth amendment's equal protection clause has applied to the states since its adoption, whereas the fourth amendment and the "judicially created" exclusionary rule has only recently been applied; (3) the educative effect of a habeas hearing on the police is of minimal value, whereas state officials operating the judiciary system should be expected to take note of the federal court's determination; (4) there is a greater concern for judicial integrity in jury discrimination claims than exclusionary rule claims; (5) the costs in retrial are less in grand jury claims than exclusionary rule claims because no evidence is suppressed; and (6) the constitutional interest is more compelling in a grand jury discrimination claim. See generally *id.* at 560-64.

101. See note 77, *supra*, and accompanying text.

102. 428 U.S. at 482.

103. See note 99, *supra*.

104. 443 U.S. at 562 (citation omitted).

105. *Id.* at 564.

106. *Id.* at 562-63.

the nature of the claim suggests judicial impropriety.¹⁰⁷

The Fifth Circuit Court of Appeals, given an opportunity in *Barksdale* to review a case similar to *Rose*,¹⁰⁸ questioned the precedential value¹⁰⁹ of Part II of the *Rose* opinion, noting that this section was joined by only two of the justices who joined in the judgment of the Court.¹¹⁰ Even conceding the possibility that Part II of *Rose* could be part of the holding, the Fifth Circuit raised the question of whether the language in *Rose* should be dispositive of every case and concluded that "in light of the facts and circumstances of a particular case, such grand jury discrimination might still be harmless error."¹¹¹ Judge Ainsworth, writing for the majority, considered that in the instant case two members of the grand jury were black, that Louisiana was in the process of eradicating jury discrimination, that there were three positive identifications, numerous items of persuasive physical evidence, and a signed confession—all unquestioned—and that *Barksdale* had never made a serious claim of innocence, and concluded that "[i]f ever there was a case in which harmless error should apply it is this one."¹¹²

The majority, consisting of twelve of the twenty-two judges sitting en banc, also agreed with Justice Powell's contention, as stated in *Schneckloth v. Bustamonte*,¹¹³ that the "central reason" for habeas corpus is "the affording of means, through an extraordinary writ, of redressing unjust incarceration"¹¹⁴ and questioned whether "freeing a petitioner who is guilty beyond a reasonable doubt of a heinous crime furthers that central concern."¹¹⁵ Although troubled by the use of habeas corpus to free guilty prisoners, the Fifth Circuit avoided deciding the issue and based its decision on the merits of the case.¹¹⁶ One can only speculate, however, as to how much the

107. *Id.* at 561.

108. Although *Rose* concerned a grand jury discrimination claim, there were some specificities which differed from *Barksdale*: *Rose* concerned only discrimination in the selection of a grand jury foreman; *Barksdale* also involved alleged discrimination in the petit jury; and *Rose* did not come to the Supreme Court from a southern state.

109. The dissent, joined by ten of the twenty-two judges, considered Part II to be precedent because, in toto, five justices agreed with it. For a discussion of *Rose* as precedent, see 1978 Term, *supra* note 82, at 199-209.

110. See 639 F.2d 1115, 1120 (1981).

111. *Id.*

112. *Id.*

113. 412 U.S. 218 (1973).

114. 639 F.2d at 1120.

115. *Id.*

116. *Id.* at 1121.

uncontradicted evidence of Barksdale's guilt weighed on the minds of the judges as they considered the merits of the petitioner's claim and found no jury discrimination where in similar cases discrimination had been found.¹¹⁷

As can be seen, the reaches and purposes of habeas jurisdiction are presently unclear. Recognizing that its power is statutorily determined by Congress,¹¹⁸ the Court—in the absence of Congressional direction—seems to be attempting to mold the structure of the writ through judicial statutory interpretation to fit the needs and concerns of the legal system today. Three particularly troubling concerns within our legal system are: (1) political concern of federal/state government relations, (2) the judicial concern of efficiency in the judicial process and (3) the societal concern of releasing guilty defendants. Interrelated as they are, a resolution of one naturally affects each of the others; and, the federal court, limited to a "case and controversy" determination, are rarely given the grounds to consider all three concerns simultaneously. Often, by forming a possible solution to one problem, the Court is not able to take into account the effect such solution may have on the other concerns. Each of these interests is equally important and fundamental to a proper functioning of our governmental system; a proper appraisal of one—namely, release of guilty defendants through habeas corpus review—cannot be done without consideration of the other two.

Federalism, or the relationship between the state and federal governments, has been a concern in our nation since its inception.¹¹⁹

117. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) and *Whitus v. Georgia*, 385 U.S. 545 (1967), in which disparities between total eligible population and eligible black males and the grand jury venire were similar. See also the dissent in *Barksdale* which points out numerous ways in which the majority's reasoning was "illogical" or impermissible. 639 F.2d at 1134-36.

118. See, e.g., *Brown v. Allen*, 344 U.S. at 499, 500, 506 (Frankfurter, J.).

119. The Constitution does not explicitly recognize the power of the federal government to review state court decisions. However, article VI declares the Constitution to be the supreme law of the land, state constitutions and laws notwithstanding. Article III establishes the judicial power in the Supreme Court, extends that power to include all cases arising under the Constitution, and grants appellate jurisdiction in these cases to the Supreme Court. At least one of the framers, Alexander Hamilton, in *THE FEDERALIST* No. 81, interpreted this appellate jurisdiction to encompass appeals from state court determination of constitutional issues. The first Judiciary Act confirmed that interpretation. The Act provided for Supreme Court review of final judgments or decrees "in the highest court of law or equity of a State in which a decision in the suit could be had . . . where is drawn in question the construction of any clause of the constitution. . . ." Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73. Twenty-seven years later, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Supreme Court also confirmed this interpretation.

Over the years legal scholars have questioned the federal courts' power of judicial review. In light of the expansive interpretation of the Bill of Rights in the past twenty years and the subsequent involvement by the federal judiciary in areas historically left to the states,¹²⁰ there seems to be a growing sentiment in our country—represented on the Supreme Court by Justices Rehnquist¹²¹ and Powell¹²²—to restore some weight to state court determinations and to restrict some of the federal courts' jurisdiction. Proponents of this position point out that: (1) state courts were given concurrent jurisdiction with the federal courts;¹²³ (2) state judges are equally bound with federal judges to uphold the Constitution;¹²⁴ (3) federal judges are no more competent than their "neighbor[s] in the state courthouse";¹²⁵ and, in fact, state court judges may be more competent in particular cases because they are closer to the facts;¹²⁶ and (4) criminal law was meant to be the business of the states.¹²⁷

Although state courts have been afforded concurrent jurisdiction,¹²⁸ a nation of fifty independent entities joined under one supreme law needs to have one source of interpretation when a conflict arises. As Alexander Hamilton said in *The Federalist Papers*, "[Fifty] independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."¹²⁹ Recognizing that the state judges are more easily influenced by local spirit than federal judges,¹³⁰ that their jobs are often at the

120. See, e.g., *Rose v. Mitchell*, 443 U.S. at 585 (Powell, J., concurring); *Brown v. Allen*, 344 U.S. at 487; *Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971).

121. See, e.g., *Sumner v. Mata*, 449 U.S. 539 (1981); *Rose v. Mitchell*, 443 U.S. at 579, 585 (joining Justice Powell's concurrence); *Mincey v. Arizona*, 437 U.S. 385, 407 (1978) (concurring in part and dissenting in part).

122. See, e.g., *Rose v. Mitchell*, 443 U.S. at 585 (concurring opinion); *Castenada v. Partida*, 430 U.S. 482, 507 (1977) (dissenting opinion); *Stone v. Powell*, 428 U.S. at 493-94 n.35.

123. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *THE FEDERALIST PAPERS* No. 82 (A. Hamilton).

124. See *Cook v. Hart*, 146 U.S. 183, 194-95 (1892).

125. *Stone v. Powell*, 428 U.S. at 493-94 n.35. See also Bator, *supra* note 54, at 509-10.

126. See *Mincey v. Arizona*, 437 U.S. 385, 410 (1978) (Rehnquist, J., concurring in part and dissenting in part); Bator, *supra* note 54, at 509-10.

127. See, e.g., *Rose v. Mitchell*, 443 U.S. at 585 (Powell, J., concurring); *Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Brown v. Allen*, 344 U.S. 443, 510 (Frankfurter, J.).

128. See note 123, *supra*.

129. *THE FEDERALIST* No. 80 (A. Hamilton).

130. See, e.g., *THE FEDERALIST* No. 81 (A. Hamilton).

pleasure of the public,¹³¹ and that states may not always be inclined to enforce laws which the government feels promote the best interests of the nation,¹³² the framers of the Constitution provided for Supreme Court appellate review.¹³³ These same concerns apply equally today, but, due to "institutional constraints,"¹³⁴ it has become impossible for the Supreme Court to "adequately oversee whether state courts have properly applied federal law."¹³⁵ Since the 1950's,¹³⁶ the Court has increasingly relied upon the federal district courts, through habeas review, to act as a surrogate for direct review.¹³⁷ Concurrent with this grant of added responsibility, the Supreme Court has expanded the scope of review afforded these district courts. Herein lies the true problem: this expanded form of habeas review allows a lower federal court¹³⁸ to overturn determinations of both law and fact¹³⁹ by the highest court of the state, thus creating a great deal of friction between the two governments. However, even though many may feel that the Supreme Court has exceeded its bounds by an overly broad interpretation of the Constitution and that federal district courts have no place reviewing state supreme court decisions, restriction of habeas review only to those claims in which the petitioner can make a "colorable claim of innocence"¹⁴⁰ may be unwise and, perhaps unconstitutional.¹⁴¹ In effect, removal of these claims from federal district court review could remove a petitioner's only access to a federal forum.

Using the writ of habeas corpus to review all constitutional claims affecting a criminal defendant's adjudication has also had a

131. *Id.*

132. *Id.* No. 80.

133. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 24 (2d ed. 1973) [hereinafter cited as *HART AND WECHSLER*].

134. *Mincey v. Arizona*, 437 U.S. at 404 (Marshall, J., concurring) (quoting *Stone v. Powell*, 428 U.S. at 526).

135. *Id.*

136. See also the Act of 1916 discussed in note 56; *supra*.

137. See *Mincey v. Arizona*, 437 U.S. at 404.

138. Often, as in this case, the lower federal court makes its determination solely on the recommendation of a magistrate.

139. Review of determinations of fact is, in itself, a muddled area of law. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court determined that a federal court could review the facts of each case to determine if the petitioner had rightly been found guilty beyond a reasonable doubt. But see *Sumner v. Mata*, discussed at notes 153-60, *infra*, and accompanying text.

140. Friendly, *supra*; note 66 at 142.

141. See note 119, *supra*.

detrimental effect on the efficiency of our judicial system. Because the procedural rules of the habeas corpus statute allow an unlimited number of successive petitions¹⁴² and provide no time limitation on filing,¹⁴³ access to the district courts through habeas corpus has increased the caseload astoundingly¹⁴⁴ and extended indefinitely the time before a final judgment is decreed.¹⁴⁵ Furthermore, since all state remedies must be exhausted before habeas review will be granted,¹⁴⁶ a petitioner and the state may go through as many as ten judicial proceedings,¹⁴⁷ not counting any retrials or en banc hearings, before a final determination is made. This process ties up judges, prosecutors, and other court personnel, diverting them from their primary function of enforcing criminal law. The point may well be reached where the delays created lead to violations of the defendant's sixth amendment right to a speedy trial.¹⁴⁸ Because of the backlog in the court's dockets, an arrested defendant—especially one too poor to post bail—has a wait, often in prison, of usually a year before his case is even heard.¹⁴⁹ The infinite possibility of having a judgment reversed also has a deleterious effect on both the deterrent and rehabilitative functions of the criminal justice system by interfering with the prisoner's "realization . . . that he is justly subject to sanction . . . [and] . . . stands in need of rehabilitation."¹⁵⁰ However, restricting habeas relief to the "arguably innocent" unless there has not been a full and fair state hearing¹⁵¹ will not necessarily

142. 28 U.S.C. § 2255 (1976). See also *Sanders v. United States*, 373 U.S. 1, 7 (1963).

143. 28 U.S.C. § 2255 (1976). See also *United States v. Smith*, 331 U.S. 469, 475 (1947).

144. In 1953, Justice Jackson felt the courts were inundated by 541 petitions, *Brown v. Allen*, 344 U.S. at 536. In 1979, 8,763 petitions were filed. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 71, at 61.

145. A prime example is the instant case where eighteen years have passed since the trial and the case is still not final; an appeal to the Supreme Court is pending. See also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970) (44 years).

146. 28 U.S.C. § 2254(b) (1976).

147. It is possible a defendant will have a trial, a state appeal, an appeal to the Supreme Court, a petition for habeas corpus to the state district court, an appeal of that determination to both the state and federal supreme courts, a petition to the federal district court for habeas relief, and an appeal to the circuit court and the Supreme Court.

148. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend VI.

149. Friendly, *supra* note 66, at 148-49 & n.27. Also, a civil case usually has a two-year wait to be heard on appeal. Because a criminal defendant has a right to a speedy trial, criminal appeals are heard first.

150. Bator, *supra* note 54, at 452.

151. See *Stone v. Powell*, 428 U.S. 465, discussed at note 78, *supra*.

relieve this problem. Petitioners simply will cast their complaint in procedural rather than substantive terms, thereby still requiring a hearing to determine the adequacy of the state process.¹⁵²

In the recent decision of *Sumner v. Mata*¹⁵³ the Supreme Court may have formulated a procedure to relieve both of these problems. In *Sumner*, the Court applied Section D of the habeas corpus statute¹⁵⁴ more strictly than it has in the past by requiring the lower federal courts to "include in [their opinions] granting the writ, the reasoning which led it to conclude that any of the [specified] factors¹⁵⁵ [negating the presumption of correctness of the state court determination] were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"¹⁵⁶ The true significance of the opinion, however, lies in the fact that the majority did not distinguish between determinations of fact and law; as the dissent points out,¹⁵⁷ the majority applies the section to a mixed determination of law and fact¹⁵⁸—an area where most criminal procedural violations take place. If the courts enforce this rule strictly, it could effectually reduce the amount of federal review of state determinations¹⁵⁹ while expressing confidence in the

152. See Duker, *supra* note 48, at 297.

153. 449 U.S. 539 (1981).

154. 28 U.S.C. § 2254(d) (1976).

155. Those factors are:

(1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; or (8) unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

Id.

156. 440 U.S. at 551.

157. *Id.* at 556-58.

158. *Sumner* concerned the constitutionality of a pre-trial identification process.

159. It is arguable, though, that a decrease in number will not occur; petitioners may continue to file and the amount of time spent reviewing the record would be as much, if not more, than the amount of time it takes to hear a case on the merits.

state judicial processes.¹⁶⁰

The third concern, and possibly the most urgent, is the release of *unquestionably guilty* defendants based on a constitutional violation. The original purpose for the formation of "government" was to band people together to provide mutual protection from aggressors. One of the principal goals of our own government, as set forth in the preamble to the Constitution, is "to insure domestic Tranquility."¹⁶¹ The law as set forth in the body of the Constitution and in state and federal statutes should be viewed as rules, regulations, and guarantees provided to aid in the continuous journey toward ultimate goals; those goals must always be kept in sight. At least one Supreme Court justice¹⁶² has recognized that "insuring domestic tranquility" is a top-priority goal; and, the Supreme Court, in 1904,¹⁶³ recognized that it should serve to aid in the interpretation of any rights implied in the text.¹⁶⁴ To live in peace and to be secure in his person, house, papers, and effects is a right of American citizens impliedly recognized by the fourth amendment,¹⁶⁵ but which transcends that amendment's restriction of governmental interference. Alternatively, the ninth amendment establishes that none of the enumerated rights should be construed so as to deny or to disparage other rights retained by the people.¹⁶⁶ Today, the courts need to broaden their perspective, to reappraise the balance sheet, and to reconsider the weight to be given a person's right—whether guaranteed within the penumbra of the Bill of Rights or retained by the people—to a peaceful and secure existence when balanced against an unquestionably guilty defendant's right to have a trial free from constitutional violations. Another constitutional conflict arises, as mentioned before,¹⁶⁷ between a possibly innocent person's right to a speedy trial and a guilty prisoner's right to review and possible reversal of his conviction.

Although the only effectual remedy to a constitutional violation

160. This situation could result if, for example, the courts leave more state determinations standing.

161. U.S. CONST., preamble. See *Estelle v. Jurek*, 101 S. Ct. 1724, 1727 (1981) (Rehnquist, J., dissenting from denial of certiorari).

162. See Justice Rehnquist's dissent in *Estelle v. Jurek*, 101 S. Ct. at 1727.

163. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1904).

164. *Id.* at 22. See also HART AND WESCHLER, *supra* note 133, at 446.

165. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

166. U.S. CONST., art. IX.

167. See text at note 148, *supra*.

within the criminal justice system seems to be reversal of judgment,¹⁶⁸ this remedy certainly is not constitutionally mandated. In weighing the costs to society sustained by freeing the guilty against the effectiveness of the remedy, the time may have come to provide another, albeit less effective, remedy—such as civil or criminal sanctions imposed upon the party guilty of the constitutional violation.¹⁶⁹

Without altering the scope of the habeas statute, the Supreme Court could implement a policy designed to keep the guilty in jail by providing a broader harmless error rule. The concept of harmless error is not new to our system of justice.¹⁷⁰ *Fahy v. Connecticut*¹⁷¹ and more explicitly, *Chapman v. California*¹⁷² recognized that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless . . ."¹⁷³ However, *Chapman* placed the burden on the state to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."¹⁷⁴ This task is nearly impossible. The Court could lessen this burden by requiring the petitioner to prove that the error did contribute to the verdict; or, in the alternative, the Court could apply a rule similar to that which California had prior to the *Chapman* opinion, that is, forbidding reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."¹⁷⁵ Granted, this change would often remove

168. See *Rose v. Mitchell*, 443 U.S. at 557-59.

169. See *id.* at 577-79 (Stewart, J., concurring); *Carter v. Jury Comm. of Greene County*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); 18 U.S.C. § 243 (1976).

170. The Exchequer Rule in England stated that prejudice presumptively attended every trial error. This statement resulted in such overcrowding that litigation seemed to survive until the parties expired. Faced with more retrials than new trials, the English created the harmless error rule which prohibited reversal absent substantial wrong. The American courts also adopted the Exchequer Rule and developed the same backlog. The Rule also was abused in America; apparently many lawyers placed error in the record as a hedge against losing the verdict (not unlike what seems to be happening with constitutional claims). Finally, in the early nineteenth century, America introduced the harmless error rule in virtually every jurisdiction. See generally Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422-23 (1980) (Mr. Goldberg's article, however, criticizes the use of harmless error as applied to constitutional claims).

171. 375 U.S. 85 (1963).

172. 386 U.S. 18 (1967). See also *Harrington v. California*, 395 U.S. 250 (1969), which gives a less restrictive interpretation to the harmless error rule.

173. 386 U.S. at 22.

174. *Id.* at 24.

175. *Id.* at 20.

from a guilty petitioner the remedy of retrial leaving him with only the right to file a civil claim.¹⁷⁶ But by requiring that the petitioner show a substantial miscarriage of justice, the Court can emphasize that the United States Government, in protecting the rights of *all* its citizens, will no longer tolerate disrespect and disregard of criminal laws. In so doing, the Court can promote judicial efficiency,¹⁷⁷ rehabilitation of criminals,¹⁷⁸ and more effective law enforcement.¹⁷⁹ It can renew the confidence in our judicial system¹⁸⁰ and generally, provide for a more secure society.¹⁸¹

Even if the Court declines to promote such a policy by broadening the harmless error rule, it should reconsider its exclusion of grand jury discrimination claims under the present rule. Justice Stewart,¹⁸² in his concurrence in *Rose v. Mitchell*,¹⁸³ advanced an excellent argument as to why an otherwise valid conviction should not be set aside on a claim of grand jury discrimination. A grand jury determines whether a crime has been committed and if criminal proceedings should be instituted against someone.¹⁸⁴ Any possible prejudice suffered by a defendant indicted by an unconstitutionally impaneled grand jury is "speculative at best"¹⁸⁵ and disappears after a valid trial jury finds him guilty.¹⁸⁶ The Court, on the one hand, has recognized a fundamental right to serve on a grand jury and on the other has not required that states use them.¹⁸⁷ It also does not require reversal of convictions where gross constitutional violations took place at the grand jury hearing.¹⁸⁸ In fact, the Court does not require reversal for any violation that took place before trial when that violation had no "impact on the trial itself."¹⁸⁹ Although

176. 42 U.S.C. § 1983 (1976).

177. See the discussion at notes 143-49, *supra*.

178. See Bator, *supra* note 54, at 452.

179. A defendant's realization that his guilt precludes any opportunity of his avoiding his prison sentence would perhaps discourage him from taking a chance.

180. See note 197, *infra*.

181. See text at notes 161-66, *supra*.

182. Joined by Justice Rehnquist.

183. 443 U.S. at 574-79.

184. *Id.* at 575.

185. *Id.* at 577.

186. *Id.* at 575.

187. *Hurtado v. California*, 110 U.S. 516 (1884).

188. 443 U.S. at 577 (Stewart, J., concurring). See, e.g., *United States v. Calandra*, 414 U.S. 338 (1973); *Lawn v. United States*, 355 U.S. 339 (1957) (violations of fifth amendment); *Costello v. United States*, 350 U.S. 359 (1956) (hearsay evidence).

189. 443 U.S. at 576 (Stewart, J., concurring). See, e.g., *Tollett v. Henderson*, 411 U.S. 258 (1973); *United States v. Blue*, 384 U.S. 251, 255 (1966); *Stroble v. California*, 343

recognizing the compelling constitutional interest in eliminating all forms of racial discrimination, Justice Stewart felt that such an interest could be fully vindicated by other means;¹⁹⁰ injunctive relief requested by qualified black citizens wishing to assert their right to serve on the grand jury, criminal sanctions against any person who discriminates, and the pretrial relief for defendants.¹⁹¹ Statutory civil remedies are also available to the defendant.¹⁹² Justice Powell answered the majority's contention that jury discrimination damaged the integrity of the judicial system by pointing to the equal amount of damage done to society's perception of the criminal justice system by allowing valid convictions to be reversed on the basis of claims having nothing to do with the defendant's guilt or innocence.¹⁹³ An argument advanced by the majority, which no concurring justice answered, is that reversal does not make a defendant immune from prosecution and is less drastic in grand jury cases than in situations where other violations occur, because upon retrial all evidence still can be used.¹⁹⁴ However, the Court did not give much import to the fact that in those cases where, for example, over two years have passed, a retrial could be in theory only: Often evidence is destroyed and witnesses are no longer available.¹⁹⁵ In short, claims of grand jury discrimination should not be grounds for setting aside otherwise valid criminal convictions.

The concern over releasing a guilty person into a society marked by a high crime rate¹⁹⁶ and a correspondingly reduced confidence in its criminal justice system¹⁹⁷ is an important concern that deserves

U.S. 181, 197 (1952) ("[I]llegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial . . .").

190. 443 U.S. at 578-79.

191. *Id.* at 578.

192. 42 U.S.C. § 1983 (1976).

193. 443 U.S. at 586 n.8 (Powell, J., concurring).

194. *Id.* at 557-58.

195. See *Brown v. Allen*, 344 U.S. at 506 (Frankfurter, J., dissenting); *Cassell v. Texas*, 339 U.S. 282, 304 (Jackson, J., dissenting); *Friendly*, *supra* note 66, at 445.

196. It is estimated that for every ten crimes committed, only three or four are reported. Over 5,000 crimes are reported annually per 100,000 persons. "[T]he odds that any one of us will be a crime victim in a year's time are better than one out of twenty." Mikva, *Victimless Justice*, 71 J. CRIM. L. & CRIMINOLOGY 189, 190 (1980).

197. Eighty-five percent of our population feel that the courts deal too leniently with criminals and that this leniency is second only to inflation and unemployment in causing the increasing crime rate; and 72 percent of our country no longer have a great deal of confidence in our Supreme Court. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS IN 1980, at 192-93, 196-97. This data was provided by the National Opinion Research Center and made available through the Roper Public Opinion Research

immediate attention. The concern, however, should receive that attention forthrightly and not through the back door of habeas corpus. The idea of denying review to a guilty petitioner is of constitutional magnitude;¹⁹⁸ and if such a policy is to be adopted, it should apply in both appellate and habeas proceedings. In addition, restrictions of habeas corpus jurisdiction related to claims of innocence are misdirected on state deference grounds—if a state court is competent enough to review a guilty defendant's claim, then the same state court should be equally competent to review claims of innocent defendants as well. Also, restriction of habeas jurisdiction to claims of innocence arguably would not serve to increase judicial efficiency.¹⁹⁹ Such a restriction, based on a claim which has never been considered within the scope and purpose of the writ,²⁰⁰ would also effectively deny a petitioner a review by a federal forum. Granted, the expanded scope of the writ of habeas corpus has made it an unwieldy procedural instrument and has confounded at least three of the major concerns in our judicial system today. Exclusion of guilty prisoners from review, however, will do nothing to make the writ more manageable and little to properly resolve any of the aforementioned concerns. The time has come for Congress to restore the writ with all its procedural requirements²⁰¹ to its original jurisdictional scope²⁰² and at the same time to provide a more suitable forum for federal constitutional claims.²⁰³ By eliminating this process of review and appeal for most prisoners—guilty or innocent—Congress would be reducing the caseload on the courts' dockets, thereby decreasing the amount of time between trial and final judgment and decreasing the amount of review of state supreme court determinations. By providing aid to the Supreme Court in their appellate review, Congress also would provide an effective federal forum for constitutional claims. If Congress or the Supreme Court then decided to institute a stricter harmless error rule, the determination would be forthright and would serve to put the citizenry of the country on notice that in balancing the constitu-

Center. See also G. GALLUP, *THE GALLUP POLL* (Chicago: Field Enterprises, Inc., Dec. 2, 1979) at 3, 4.

198. See note 119, *supra*.

199. See the discussion at note 159 and text at note 152, *supra*.

200. See generally text at notes 23-46, *supra*.

201. See text at notes 142-43, *supra*.

202. See text at notes 36-44, *supra*.

203. A number of suggestions have been made for such a forum. Judge Friendly suggests either an appropriate court of appeals or a newly-created court. See Friendly, *supra* note 66, at 67.

tional rights of Americans, the government has found the right to domestic tranquility, and to a peaceful and secure existence, to outweigh the right to procedural guarantees that do not affect the fact-finding process.

Michelle Ward LaBorde

LOUISIANA LIGNITE—A LUMBERMAN'S LAMENT:
Continental Group, Inc. v. Allison (La. 1981)

After extensive negotiations, a vendor sold several non-contiguous tracts of land comprising 90,000 acres to the vendee, a timber producer, subject to a reservation of *all mineral rights*. The plaintiff corporation (Continental Group) succeeded the original vendee; the vendor corporation dissolved and distributed its remaining assets among the present defendants. Continental Group sought a declaratory judgment, asserting that each servitude created by the mineral reservation included only the right to explore for and exploit oil, gas, and kindred minerals and did not include the right to strip-mine solid minerals. The parties stipulated that the servitudes had expired as to all minerals on several non-contiguous tracts because nothing had occurred on these tracts to interrupt the ten-year prescription of non-use. The defendants asserted that prescription on the servitudes governing the other tracts had been interrupted by oil or gas production and that accordingly they were entitled to strip-mine the lignite coal on those lands. The plaintiff then contended that the defendants' oil and gas operations were insufficient to prevent accrual of liberative prescription as to solid minerals which require a different method of extraction from the earth. The Louisiana Supreme Court *held*, on rehearing, that the original parties' negotiations evidenced their intent to include the right to strip-mine lignite coal in the reservation, but that this right had prescribed by non-use notwithstanding the production of oil and gas. *Continental Group, Inc. v. Allison*, 404 So. 2d 428 (La. 1981).

Generally, the use and extent of a contractual servitude must be regulated exclusively by the written act creating it. When the terms are clear and explicit, the servitude cannot be restricted, modified, or limited.¹ Often, however, the contracts, especially those creating

1. See *Delahoussaye v. Landry*, 8 La. Ann. 549, 550 (1848).